Family Law

Jactitation of Marriage

1. As a part of the comprehensive examination of family law (Item XIX of our Second Law Reform Programme) we are bound to examine the matrimonial remedy of jactitation of marriage. This is a little used remedy and in this Working Paper we have set out shortly its historical background in the hope that this will assist the persons and bodies we are consulting.

2. A petition in a suit for jactitation[1] of marriage is designed to prevent unwarrantable assertions that a marriage exists.[2] Where the respondent falsely and without the petitioner's assent asserts that he is married to the petitioner, the petitioner can obtain a declaration that he is not, coupled with an order forbidding the respondent from repeating the assertion.[3] Only the person claiming to be

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1. The word "jactitation" is derived from the Latin jactitare, meaning to boast; the ancient name of the cause was jactitationis matrimonii causa.

2. Goldstone v. Smith (1922) 38 T.L.R. 403, 405.

3. The old form of petition recited that "the respondent wilfully and without the consent of your petitioner boasted and asserted that he was married to your petitioner, that he is no wise the husband of your petitioner, nor was he at the time of such boasting, that he refuses to desist from boasting that he is the husband of your petitioner" and prayed that the court should order that "the respondent do cease and desist from such boasting and that he be enjoined perpetual silence in the premises" (see Thomas v. Rourke [1893] P.11; Goldstone v. Smith, supra); the decree made the declaration that the parties were not married and enjoined the respondent to be perpetually silent on the subject; Rayden, 11th ed., suggests more modern phraseology: pp. 3054, 3138.

misrepresented can bring the suit,[4] which can be brought only against the person claiming to be married to the petitioner. The suit cannot be used to forbid third parties from alleging the existence of a marriage.

3. The suit for jactitation of marriage was brought in the Ecclesiastical Court until the Matrimonial Causes Act 1857 transferred the jurisdiction of that court to the newly created civil court for Divorce and Matrimonial Causes.[5] Under the Supreme Court of Judicature (Consolidation) Act 1925[6] the suit (with other matrimonial suits) is assigned to the Probate, Divorce and Admiralty Division so that the suit must now be instituted in a divorce county court[7] and is transferred to the High Court if it becomes defended.[8] The defences to the suit are three in number: first, a denial that the assertion was made;[9] second, an admission that it was made but that it is true;[10] third, that the misrepresentation was acquiesced[11]

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4. De Campbell v. Corley, ex parte Campbell (1862) 31 L.J. (P.M. & A.) 60.
5. s.6.
6. s.56(3).
7. Or in the divorce registry where it will be treated as pending in a divorce county court: Matrimonial Causes Act 1967, ss. 1(3), 4, 10(1); Matrimonial Causes Rule 4.
8. Matrimonial Causes Rule 5(4).
9. Hawke v. Corri (1820) 2 Hag. Con. 280.
10. Lindo v. Belisario (1795) 1 Hag. Con. 216; (1796) 1 Hag.Con. App. 7; Hawke v. Corri, supra; Thompson v. Rourke [1893] P.70, C.A.; Goldstone v. Smith (1922) 38 T.L.R. 403; Schuck v. Schuck (1950) 66 (pt.1) T.L.R. 1179; Igra v. Igra [1951] P.404.
11. Thompson v. Rourke [1893] P.11, 14 ("In other words, has [the petitioner] allowed herself to be represented as his wife?").

in by the petitioner.[10] If the court upholds the respondent's claim that he is validly married to the petitioner, the court can make a declaration that the parties are validly married, which declaration operates in rem.[12]

4. Consequently, a suit for jactitation of marriage could be used by parties desiring to obtain a declaration that their marriage was valid. Ecclesiastical Courts made such declarations only in suits for restitution of conjugal rights[13] or for a divorce a mensa et thoro (i.e. a judicial separation),[14] or if the issue as to whether a marriage was valid was referred to it by the temporal courts, the Ecclesiastical Court being the only court which had jurisdiction to pronounce on that issue,[15] or in suits for jactitation of marriage where the respondent's defence that there was a valid marriage between him and the petitioner was upheld.[16] Only the last method resulted in a bare declaration and there was no other means whereby parties could obtain such a declaration.[17]

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12. Poynter, Ecclesiastical Court, p.271; Goldstone v. Smith (1922) 38 T.L.R. 403.

13. Roach v. Garvan (1748) 1 Ves. Sen. 157; Burn, Ecclesiastical Law (1842) Vol. II, p.500.

14. Guest v. Shipley (1820) 2 Hag. Con. 321; Anon. (1857) Dea. & Sw. 295.

15. Head v. Head (1747) 3 Atk. 547; Duchess of Kingston's Case (1776) 20 State Tr. 355, 538, 539; Har-Shefi v. Har-Shefi [1953] P.161, 168, 169, C.A.; Burn, Ecclesiastical Law, 2nd ed. (1767), p.423.

16. See para. 3 above.

17. The statement in Schuck v. Schuck (1950) 66 (pt.1) T.L.R. 1179 that it was the "established practice of the ecclesiastical courts" to grant declarations is not supported by authorities: Har-Shefi v. Har-Shefi [1953] P.161, 165, 168, 169, C.A.; De Gasquet James v. Mecklenburg-Schwerin [1914] P.53, 69, 71. The Ecclesiastical Court, of course, made the converse declaration, namely that there was no valid marriage, whenever it granted a decree of nullity.

5. Prior to Lord Hardwicke's Act 1754, which first made a formal ceremony of marriage compulsory, marriage was constituted either de praesenti by an exchange of vows with the intention that a marriage should come into effect then and there,[18] or de futuro by an exchange of promises to be married at a future date followed by cohabitation. Such informality, not unnaturally, frequently gave rise to doubt or dispute as to whether a marriage had taken place and until the Act of 1754 a suit for jactitation was the usual mode by which questions as to the validity of a marriage were determined.[19] With the requirement of a formal ceremony in order to constitute a marriage, proof of such ceremony was all that was needed to establish a marriage and the necessity for frequent resort to the court for this purpose disappeared.

6. In addition to its use in cases of doubt as to the validity of a marriage, a jactitation suit was at one time extensively used to obtain collusively,[20] and even fraudulently,[21] a declaration that a first marriage was invalid, so that a second marriage would be recognised as being valid, and not bigamous. A decree[22] of jactitation of marriage was conclusive

18. This is to-day called a marriage at common law and is still possible outside England and Wales in certain rare circumstances.

19. Rogers, Ecclesiastical Law (1840), p.481; Poynter, op.cit., p.266 says this was the only mode available.

20. Rogers, op. cit., p.482.

21. Poynter, op. cit., p.265.

22. The decree recited that "the party had failed in his proof and that the libellant is free from all matrimonial contract as far as yet appears": Duchess of Kingston's Case (1776) 20 State Tr. 355.

evidence that the petitioner and the respondent were not married[23] and appears to have been sought where a decree of nullity could not be obtained.[24] But this procedure suffered a set-back in 1776 in the Duchess of Kingston's Case.[25] In that case the Duchess, in a prosecution for bigamously marrying the Duke of Kingston, relied by way of defence on a decree of jactitation in respect of her first marriage to another man, but it was held that the decree could be binding only on the parties to the suit and, therefore, was not binding on the Crown.[26] The suit thereafter fell into "disrepute",[27] so much so that in 1820[28] Lord Stowell described it as "a proceeding not now very familiar to this court" and added "but it has nevertheless, I presume, a legal existence"; in 1892[29] the court found it necessary to adjourn a case because "suits for jactitation of marriage are so rare in modern times that we desired to inquire into the practice"; in 1900[30] the court remarked that the suit has "fallen into

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23. Hatfield v. Hatfield (1725) Str. 960; Burn, Ecclesiastical Law, 2nd ed. (1767), pp. 427-8.

24. Rogers, op. cit., p.482.

25. (1776) 20 State Tr. 355.

26. See at 534, 544, 545; it seems from the conclusions expressed in that case that the decree may not even be conclusive as between the parties, but that the respondent can reopen the case and show on new evidence that he was married to the petitioner.

27. Burn, Ecclesiastical Law, 9th ed. (1842), Vol.II, p.500; Shelford, Marriage and Divorce (1841), pp. 583-4.

28. Hawke v. Corri (1820) 2 Hag. Con. 280, 281, 284.

29. Thompson v. Rourke [1892] P.244, 245, C.A.; further proceedings [1893] P. 11; 70, 72, C.A. ("A suit for jactitation is a rare proceeding").

30. Cowley v. Cowley [1900] P.305, 313, C.A.

disuse". Thereafter there were cases reported in 1906,[31] 1922,[32] 1950,[33] 1951[34] and 1968.[35] The case in 1968[35] was the last case on record.

7. In 1846[36] Lord Brougham expressed his regret that there was not in England, as there was in Scotland, a declaratory action and in 1849 he introduced a Bill to make it possible for a party to obtain a judicial declaration of a particular status, such as his marriage or his legitimacy. Though that Bill was rejected, nine years later the Legitimacy Declaration Act 1858[37] was passed enabling a person in certain circumstances to apply for declarations of legitimacy, validity of marriage or British nationality. Moreover, the Divorce Court now has power[38] under R.S.C. Order 15, rule 16 to make declaratory orders as to the subsistence or absence of a marriage.[39] Accordingly, although

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31. Ascroft v. Trevor (1906) Times, March 13 to 23.

32. Goldstone v. Smith (1922) 38 T.L.R. 403.

33. Schuck v. Schuck (1950) 66 (pt. 1) T.L.R. 1179.

34. Igra v. Igra [1951] P.404.

35. Malhotra v. Pinfield-Welles, (1968) November 12, No.2941 of 1968; for earlier proceedings see (1968) Times, March 28.

36. Earl of Mansfield v. Stewart (1846) 5 Bell 139, 160, H.L.

37. Now reenacted in the Matrimonial Causes Act 1965, s.39.

38. This power was first given to the Divorce Court by the Matrimonial Causes Rules 1924, Rule 97, which applied R.S.C. Order 25, r.5 (now Order 15, r.16) to proceedings in the Divorce Court: see Har-Shefi v. Har-Shefi [1953] P.161, C.A.

39. Declarations that a marriage was valid ab initio may only be made under the Matrimonial Causes Act 1965, s.39: Aldrich v. Att.-Gen. [1968] P.281, but that a marriage is valid, the question of its initial validity not being in issue, may be made under R.S.C. Order 15, r.16: Aldrich v. Att.-Gen., supra at 293; Collett v. Collett [1968] P.482, 494; Garthwaite v. Garthwaite [1964] P.356, C.A.

a jactitation suit may have been of use in obtaining a declaration of validity or invalidity of marriage, it is no longer needed for that purpose to-day, more appropriate means being available for that purpose.

8. Finally, a jactitation suit was "for the purpose of obtaining a remedy for the inconvenience to which an individual may be exposed by the false assumption of the character of husband or wife on the part of another, between whom and the complainant no such relation exists",[40] and whereby "a common reputation of the matrimony may ensue".[41] It may be that false assertions that people are married to each other are among those embarrassing falsehoods which it should always be possible to restrain by injunction. But a suit for jactitation is not the right vehicle. What the victim needs is a remedy against any of those who are spreading the false rumour (for example, the newspaper which is repeating it in its gossip column); not merely against the other party to the alleged marriage who is more likely to be another innocent victim of the rumour. At present he may have such a remedy if the assertion is defamatory of him; but unless he is already married to someone else it is unlikely to be defamatory, though it will generally be acutely embarrassing. It could be argued that victims of embarrassing rumour and gossip should have a better remedy, but it is clear that the matrimonial suit of

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40. Poynter, op. cit., p.264; Shelford, op.cit., p.583; Burn, Ecclesiastical Law, 9th ed. (1842) p.500.

41. Blackstone, 3 Comm. 93; Shelford, op.cit., p.582.

jactitation is not the right remedy: it has no potential for growth as the appropriate remedy; it is limited to false assertions of marriage (other assertions are equally embarrassing and more common, for example, an allegation that the parties are engaged), and it can be used only by one party to the alleged marriage against the other. If reform is needed it must come through changes in the general law of tort or crime; not through reforms of matrimonial law.

9. Our conclusion is that the remedy of jactitation of marriage is to-day inappropriate and should be abolished. This is a provisional conclusion only and will be reconsidered in the light of any comments and views received in reply to this Working Paper.